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No. 8, Original

IN THE

Supreme Court of the United States

October Term, 1982

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants,

THE UNITED STATES OF AMERICA AND STATE OF NEVADA,

Interveners,

STATE OF UTAH AND STATE OF NEW MEXICO,

Impleaded Defendants,

COLORADO RIVER INDIAN TRIBES, FORT MOJAVE INDIAN TRIBE, CHEMEHUEVI INDIAN TRIBE, COCOPAH INDIAN TRIBE, AND FORT YUMA (QUECHAN) INDIAN TRIBE,

Recommended Interveners.

Separate Response of the Quechan Tribe to the Exceptions Asserted by the State Parties, et al. to the Special Master's Report Dated February 22, 1982, and Brief in Support Thereof.

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INTRODUCTION.

The Quechan Tribe is filing this Separate Response because there are certain aspects of the case at bar which have a unique application to their reservation. The five Indian tribes have filed a joint Response to the Exceptions to the Special Master's Report, and the Quechan Tribe completely concurs in the joint Response, but submits this Separate Response because it believes that such an addition will be of assistance to the Court.

ARGUMENT.

I.

CONFLICT OF INTEREST.

At the outset, an important observation must be mentioned regarding the truly unfair and unwarranted attack upon Special Master Tuttle by the State parties, et al. In making their attack they are conveniently forgetting vital facts that precipitated these somewhat belated hearings for a full presentation of the Indian claims. Proof positive of this is made quite clear when one simply reads their accusation that:

> "The most singular fact about the Indian Tribes' claims is that the Special Master has found 15,403 net acres practicably irrigable (and has awarded 102,072 acre-feet of diversion rights) (Spec. Master's Rep., pp. 254, 266, 274, 277) *not even claimed by the United States*. For years, the United States has been criticized by these five lower Colorado River Indian Tribes for its alleged failure to represent them adequately at the original trial of this matter before Special Master Rifkind in the late 1950's. Faced with this criticism, *the United States initiated the current proceedings in late 1978* in order to assert additional water rights claims on behalf of the Tribes and was undoubtedly *motivated to assert the maximum claims reasonably possible* in order to justify its conduct as trustee. Under such circumstances, *it is incredible* to imagine that the United States and its experts could have been so unprincipled or so incompetent as to fail to assert the practicable irrigability of these 15,403 net acres recommended for water rights by the Master.
>
> "And yet the Master's finding necessarily implies exactly that since it recognizes almost 50% more acreage as practicably irrigable than was claimed by the United

States." (Emphasis ours) Pp. 94 and 98 of Exceptions by State parties, et al.

This statement makes it easy to realize that the State parties, rather than address the facts, are attempting to discredit the Special Master, particularly when they go on to describe his recommendations as "incredible" and "astounding". In other words, they would like to have this Court believe that he must be "unfair" since, as they argue, there is really no "conflict of interest" between the United States and the Indian tribes. On the other hand, the reality of this conflict did not elude the Special Master who announced his awareness of it on August 28, 1979, on Page II of his Memorandum and Report on Preliminary Issues when he said:

> "There nevertheless remain differences between the interests of the United States and those of the Indian tribes. Most noticeable is the difference in their claims. The claim by the United States was not filed until after the Tribes had already moved to intervene and complained of delay by the United States in claiming on their behalfs. At least in their pleadings, the United States and the Tribes claim significantly different amounts of irrigable acreage. See note 6, supra. To the extent of these differences the Indian claims are not actually represented."

In other words, Special Master Tuttle commenced the Indian evidentiary hearing with a total awareness of the fact that the positions of the United States and the Tribes were quite different. On the other hand, the State parties have apparently subscribed to the idea that the trustee's position should be the same as that of the beneficiary. To this the Indians would merely remark that such should be the case when there is no conflict of interest, but when the United

States also has a duty to deliver water to their opposition pursuant to contracts made by the Secretary of the Interior and other areas of conflict the situation is markedly different.

A. Objective Evaluation Is Made Difficult.

In the instant case the task of determining the factual truth when attempting to evaluate the evidence record which has been presented by the United States, as trustee, and that by the Indian beneficiaries is most difficult when one realizes that the trustee has a conflict of interest. In other words, when evidence is presented by the State parties which is in conflict with that of the Indians, it is easy to realize that this is the result of their adversary positions, but the obvious duty of the United States, as trustee, "to advance the interests of the beneficiaries of the trust without reservation" poses a serious question when from the evidence it appears that the trustee is less than supportive of the Indians and in harmony with the State parties. (Message from the President of the United States transmitting recommendations for Indian policy, July 8, 1970, in hearings before the subcommittee of Administrative Practice and Procedure, October 19 and 20, 1971, Page 226).

Of particular importance here is the fact that is apparent from an examination of the record in the instant case that we have a striking difference between the claims asserted by the United States and those asserted by the Quechan Indians. For instance, in its final submission of evidence, the United States refused to make any claim whatsoever for water to irrigate the Quechan lands north of the All American Canal. Further, the United States repeatedly refused to modify its position to lend support to the Quechan claims, despite the expert testimony given at the trial in support thereof. In fact, the record also reveals that in this area the United States even rejected its own evidence favoring the

Quechans, and retreated to a point which could only give aid and comfort to the State parties. This is appreciated by reference to the record.

In the written Rifkind Hearings, the United States told the Court that it was going to claim "all" of the irrigable lands. (Rifkind Hearings, 12452-12453, 12455, 12460, 12463). However, upon being questioned by Special Master Rifkind, they admitted that they were presenting evidence of something less. (Rifkind Hearings, 14155).

In our recent hearing in Denver we learned that the earlier claim by the United States for less than the Indian entitlement was a deliberate abdication of trust responsibility. Jim Jones, as an agent for the Bureau of Indian Affairs, explained that he had been assigned in 1955 to the Irrigation Map Team and given the job of mapping the Quechans' "irrigable acres" at Yuma south of the All American Canal. (TR 1X, 1604). He mapped some 4800 irrigable acres of lands that the United States was not claiming. (TR 1X, 1604-1605). While these lands were being administered by BLM under a reclamation withdrawal at that time, the Bureau of Indian Affairs considered them to be part of the Quechan Reservation. (TR 1X, 1007).

The United States, faced with such a conflict between these agencies, simply ignored Jone's report and only asserted the smaller 1904 Yuma Project figure of 7,743 acres. These are part of the lands now reaffirmed as part of the Quechan Reservation. The United States failed in the Rifkind Hearings to consider the true extent of the Quechan Reservation and thereby failed to claim the amount of water to which the Quechan Indians would have legally been entitled. Furthermore, this failure by the trustee for the Indians to claim "all" of the water that belonged to them makes it easy to understand why the United States also hid behind the attorney client-privilege during the Denver hearings to

make certain that the testimony of another witness called by the Quechans, Charles P. Corke, was excluded. (TR VIII, 1514, *et seq.*).

B. The "Conflict of Interest" Issue Is Still Relevant.

Now that the Indians have had their day in court with independent legal representation one can logically ask if the "conflict of interest" issue is still significant. The Quechans offer an unequivocal answer in the affirmative, and they hasten to note that in evaluating the evidence presented by the United States and the Indians, one must do so with an awareness of the same old conflict of interest issue since its persistence has impeded the United States as trustee. In the Rifkind Hearings the conflict of interest kept the United States from asserting a full and complete claim for the Quechan Indians south of the All American Canal.

In the current hearings their position clearly has remained about the same. In our most recent hearings the United States has attempted to exhibit an aggressive effort on behalf of the Quechans respecting their irrigable lands south of the All American Canal by admitting that they were wrong during the first hearings. On the other hand, they have adhered to their original policy by rejecting their own evidence regarding the irrigability of the lands north of the All American Canal. On this point the record speaks. The United States hired Earth Environmental Consultants in 1975 to determine the irrigable acres of land on the Quechan Reservation. Before making that contract the concerned parties were careful to ascertain they they had hired outstanding experts. These experts located thousands of irrigable acres in the Araz Wash area north of the All American Canal. The United States thereafter accepted their conclusion. In fact, Mr. Kersich, one of the expert engineers for the United States, made irrigation system studies respecting

this land because Doctor Stoneman, a soils expert of the United States, had found 3,540 irrigable acres north of the All American Canal. In addition, Dr. Kleinman, the economic expert employed by the United States, also reported a positive payment capacity for those irrigable acres north of the All American Canal. Then, in early 1980, the United States resorted to type — a trustee beset by a conflict of interest — and concluded that these northern lands were non-irrigable because Kersich's costs were a few dollars higher than Kleinman's severely limited, error-written payment capacity study of citrus. (TR III, 542, 562). No one on behalf of the trustee so much as suggested that Kleinman review his studies or consider grapes or dates, both of which he knew to be profitable. (TR V, 823, 836-838; XXX, 6143-6146).

Against this backdrop it is not difficult to conclude that the United States has been considerably less than consistent in its attempt to wear more than one hat, and that its ultimate conclusions conflicting with those of the Quechan Indians must be carefully considered since they are the logical result of the past and existing conflict of interest. In other words, fear of the impact of the total admission of inadequate representation by the United State due to its conflict of interest allows us to understand why it has only made a partial admission in these most recent Indian hearings. Yet, this partial admission should strongly suggest a great degree of caution in evaluating the State parties' negative arguments regarding the Quechan Reservation. This we submit is what guided Special Master Tuttle.

C. The Indians Initiated These Hearings.

For some strange reason, the United States has attempted to have everyone believe that the State parties were responsible for the most recent hearings. On the other hand,

the State parties *et al*, at Page 95 of their Exceptions have stated that "the United States initiated the current proceedings in late 1978". The truth of the matter is that it was the Indians who "triggered" the current proceedings when in 1971 the leaders of their five Tribes were asked by the United States and the State parties to stipulate as to the amount of water they could have from the Colorado River. This was to be done without the benefit of either independent counsel or a hearing. In the wake of many meetings that followed, the Indians refused. Their story is now verified by portions of the Affidavit of Lewellyn Barrackman, Chairman of the Fourth Mojave Tribal Council, who said:

> "In response, the Indian leaders objected to the Stipulation and requested that a diligent effort be made without further delay to obtain the facts so that the truth could be presented to the Supreme Court.
>
> "In early 1971, the Indians requested that the Secretary of the Interior make funds available to employ experts in the area of soil classification so that their irrigable acres under the *Winters* Doctrine could be correctly determined. Again the Indians were urged to accept the proposed Stipulation — the 'deal' that their trustee had made with the States and the Irrigation Districts! Our Indian leaders in turn went to see the Chairmen of the Indian Subcommittees of both the Senate and the House.
>
> "On March 31, 1975, a consulting firm was employed. The consulting firm soon found that the priority dates claimed and acreages claimed were wrong, and were based upon 'a deal' made by the States and not upon facts.
>
> "Again, in 1975, the Indian leaders were again called to a meeting by the Bureau of Indian Affairs to consider the soil classification work which had been completed, and to give their approval. The preliminary results

looked rather good to our Indian leaders, but we could not give our approval due to the fact that certain specific areas of land had not been included, and we were unwilling to endorse such deception. At this time we were warned that if we kept on insisting upon the truth being presented to the Supreme Court that we would really be in trouble. Although we had no wish to be unreasonable we firmly felt that anything short of a truthful presentation would be both intolerable and unconscionable. Hence, all of the Indian leaders agreed to stand firm.

"In May of 1977, the States gave up on their plan to sell the proposed Stipulation and filed a joint motion to have the Supreme Court enter a decree which in substance was the same as the Stipulation. In response, the United States has continued its refusal to aggressively advocate our Indian rights. In fact, when I requested additional time to provide Indian input for the response I was once again told that this could not be done. Hence, since we really lacked true legal representation for our Indians, I called a meeting of our Indian leaders and we agreed to ask the Supreme Court to take cognizance of the inherent conflict of interest which besets the United States, and to allow us to have our position presented by independent legal counsel of our own choice." (Appendix A to the Indians' Petition to Intervene, dated April 7, 1978).

It should therefore be apparent that the filing of the Petition by the Indians was in fact what triggered these proceedings. The Tribes believed that they had been entitled to a full and complete presentation of the facts, and that their trustee had failed to do this. They further believed that it was the conflict of interest which had beset their trustee that had precluded the United States from asserting claims for a greater amount of water to which they were legally

entitled. The Quechans understand that in general when legal representation is provided by the United States on their behalf that they will be bound. *Heckman v. United States* (1912) 224 U.S. 413, 445-46, 32 S. Ct. at 434-35. On the other hand, they are also mindful that when the United States breaches its trust duty to the Tribes while openly advancing its own interest the Tribe would not be bound. *Winship v. Ricketts* (1929) 32 F.2d 476, 479 (8th Cir.) and *Seminole Nation v. United States* (1942) 316 U.S. 286, 62 S. Ct. 1049, 86 L. Ed. 1480. The State parties have urged that the Indians should not have been allowed private counsel because they argue that this is only proper when the United States first admits that there is a conflict of interest. The Quechans disagree because this would deny the Indians the right to counsel of their choosing in cases where their trustee was beset by a conflict of interest but was unwilling to admit it. The Quechans therefore believe that the Special Master should be sustained by this Court for having allowed their intervention. *Trbovich v. United Mine Workers* (1972) 404 U.S. 528, 30 L. Ed. 2d 686, 92 S. Ct. 630.

II.

THE SPECIAL MASTER'S CLASSIFICATION OF THE PRACTICABLY IRRIGABLE LANDS NORTH OF THE ALL AMERICAN CANAL IS SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

Special Master Tuttle on Page 253 of his Report sets forth his findings regarding the practicably irrigable lands claimed by the Quechan Indians that are located north of the All American Canal. He said:

> "In short, I find that 6,785 gross acres north of the All American Canal are arable. Considering the suitability and economic analysis above, these acres are thus, practicably irrigable."

The Special Master then on Page 254 states his conclusions regarding the practicable irrigability of the Quechan indian lands by saying:

> "The gross irrigable acreage consisting entirely of boundary land in California both north and south of the Canal must be converted to net figures. As performed by the Tribe's experts this calculation would be:

California Boundary Lands	Gross Acres	Net Acres
Northern Lands	6785 × .90	= 6107
Southern Lands	98 × .94	= 92
		6199

> The net acres are thus entitled to diversion rights as follows:

Net Acres	Diversion Rate (A.F.)	Total (A.F.)
6199	× 6.67 (A.F./Ac.) =	41,347 (A.F.)

> The decree should be amended accordingly."

The State parties, *et al.* challenge the Special Master's conclusion by arguing that it is not supported by the evidence. In reply the Quechans would like to say that the State parties' discussion in their briefs and their Exceptions regarding these lands north of the All American Canal is marked by omissions, inconsistencies, and contradictions. By way of evidence we wish to cite specific examples as follows:

1. One of the most interesting observations regarding the State parties' argument was their non-discussion of prices. It is the second part of their payment capacity analysis for permanent crops. The first part is an analysis of

yields, which discusses specifically and in detail the comparative yields of the Indian experts (*e.g.*, witness Boyle's projected yield of 5.5 tons per acre for grapes) and their Bookman-Edmunston (hereinafter BE) experts (*e.g.*, 4.4 tons per acre for grapes).

By contrast with these specific yield analyses, the State parties' discussion of prices performs the tour de force of never once mentioning anybody's price for any crop. In the abbreviated (four page) discussion the State parties talk about the concepts of 1980 price data, 1979 costs, "representative prices and costs," five-year averages, three-year averages, gross revenues, all in the most general, uninforming language, in remarkable contrast to the specific discussion of various experts' yield projections.

The reason is easy to see. There was no way for the State parties to discuss actual prices without disclosing the way they had reached their low payment capacities. The best example is grapes. (Ex. SP 121). The State parties trumpeted throughout the hearings the inability of grapes, at a $58 payment capacity, to pay water costs which in every case greatly exceeded that amount. The BE payment capacity numbers were inexplicable; there was simply no way to square them with the testimony of all the witnesses that grapes were showing a profit of around $1000 per acre after *all* costs. (As one example, Henry Chavez, the State parties' witness, testified that the five-year average profit for Coachella grapes was over $1000 per acre.) (TR XXIV, 4825). The question was how BE did it.

BE did it by repudiating its announced method of determining prices. One of their most significant witnesses was Mr. Beeby. Beeby's testimony on this point deserves emphasis. He said that BE started with an average of the last five years' prices. But if prices are seen to rise continually over the five years, "you would be understanding to use

the five year average, and would probably be justified in, say, taking the last two or three. (TR XXI, 4083).

If the foregoing method of determining prices had been applied to grapes, it would necessarily have resulted in BE's taking an average of the last three years' prices, 1977-1978-1979. We say necessarily because the evidence was that grape prices were depressed in the early years of the 1970's as a result of the farm workers' grape boycott as Nicholas Kondora of the White Wing Ranch testified:

> ". . . the grape industry went through quite a traumatic experience through the Caesar Chavez days in the late '60s and early '70s." (TR X, 1855).

White Wing, he said, lost money in the Caesar Chavez years.

> "I imagine we have lost as high as $800, $900 an acre, and made as much as $2000 an acre." (TR X, 1856).
>
> "Q. Those $800 to $900 losses you talked about . . ., were those the Caesar Chavez years?
>
> "A. Yes." (TR X, 1886).

It is immediately apparent that any estimate of prices which would take into consideration the grape boycott years of the early 1970's would not only be unfair but would violate BE's own criteria. *Yet this is exactly what BE did.* BE's investigations showed that grape prices for the three-year period 1977-1979 averaged $943 per ton. (Ex. FY-43). This number was some $265 per ton higher than the grape price used by Boyle in its initial analysis of the profitability of grapes. (Ex. Fm-2, the Boyle report on Fort Mojave, shows a price of $680 per ton). BE looked closely into this discrepancy and discovered that Boyle had come to its number on grape prices by averaging not the last three years or five years or any number of last years but instead by using prices for the years 1971-1978. The BE investigators re-

ported specifically on this point, "Looks like Boyle used 1971-1978 prices." (Ex. FY-44).

Knowing that Boyle had used a time frame which BE by its own testimony considered improper and knowing that the average of the last three years, the right time frame to use, would produce an additional $265 per acre in estimated grape prices, BE had no doubt about what to do; BE repudiated its own standards and adopted the Boyle 1971-1978 prices for grapes. The result, of course, was to drive the gross grape price down by over $1000 per acre (the BE yield estimate of 4.4 tons × $265 per ton = $1166.) And this is how the state parties have been able to reiterate their theme that grapes do not have a high enough payment capacity.

The truth is that, as a BE consultant, Camal Sakouri, told BE, grapes are "extremely profitable . . . tremendous money." (Ex. CR-16, p. 2). Chavez said Coachella grapes netted $1500-$2000 per acre in 1980 and only slightly less than that in 1979. (TR XXIV, 4825). To illustrate just how profitable grapes have been we offer some additional calculations using, once again, the State parties' format in Exhibit SP-121. The first calculation is based on the testimony of the State parties' witness, Michael Bozick. The State parties rely heavily upon Bozick, who we submit came to bury the Indians. Bozick's most extreme statement was that the maximum grape production that could be gotten from the northern lands would be about 300 lugs (3.3 tons) per acre; in other words that the class IV northern lands would produce 50 lugs per acre less than his class VI very rocky, very gravelly soil. We believe that his testimony is an exaggeration and that the best explanation for it is that Bozick is a Coachella Valley grape farmer who does not want California water to go to the Indians and does not want competition from the Yuma area. The strongest evidence

in support of our belief came in the State parties' opening brief, in their statement that the inhabitants of the Coachella District look on this water litigation "not just immediately as a matter of economics, but potentially as a matter of survival." (SP II, 40). A witness who fears for his survival cannot be expected to be objective in his testimony.

But if Bozick's testimony were taken straight, it would still show grapes to be profitable on the northern lands. If the State parties are to rely on part of Bozick's testimony, then it is only fair that they take it all, prices as well as yields. One need only compare the BE grape price of $680 per ton used in Exhibit SP-121, with Bozick's grape price of $1091-$1339 per ton (Bozick said he got $14.70 per lug but others would get $2-$3 less, so we use $12-$14 per lug; TR XXVII, 5530) to appreciate why the State parties have avoided discussing any specific grape prices. And if we accept Bozick's 300 lugs (3.3 tons) per acre and the low end of his prices, $1091 per ton (what he said others would get; TR XXVII, 5530), a calculation in the format of Exhibit SP-121 shows that, adjusting harvest costs for the reduced yield, grapes show a profit in the fifth year, all borrowings and interest are repaid by the ninth year, and the accumulated net profit at the end of 25 years is $17,530. This calculation is set forth in detail in Appendix A, page i, at the end of this Response.

Of course, Bozick said he was incurring more fertilizer and other pre-harvest costs on his class VI lands. He did not estimate those costs, but if we accept even BE's high estimate of a 25 per cent increase in production costs, grapes are still profitable on Bozick's numbers. Under these harshest of all assumptions, grapes show a profit in the fifth year, repay all borrowings and interest in the fifteenth year, and produce an accumulated net profit at the end of

25 years of $8,329. This calculation is set forth in full at page ii of Appendix A to this Response.

These calculations dramatically expose, also, the exaggeration in Bozick's testimony. He said that at 350 lugs per acre and $14.70 per lug he was just breaking even. Lowell True, another witness, told the BE people that 350 lugs per acre was sufficient to show a profit "throughout the state" (Ex. FY-43), and the above calculation at 300 lugs per acre shows how right True was. At 350 lugs, using $1339 per ton ($14.70 per lug) and an assumed 25 percent increase in pre-harvest costs, Bozick would be grossing over $5000 per acre, he would be showing a net profit in the second grape-bearing year, and would have an accumulated net profit at 25 years of over $36,000. There is simply no way to reconcile Bozick's own numbers with his claim that he is merely breaking even on his class VI very rocky, very gravelly soil.

We make one final calculation of grape prices, which arose out of the opening brief of the other tribes. The tribes there say that witness Maddock in his later testimony used a five-year average and derived a price of $869 per ton. Our grape analysis was predicated upon a price of $930 per ton, which was the lowest price of the three years 1977-1979. We used a three-year average because the criteria established by BE dictated the average of the last three years in this case. But if we instead use Boyle's estimate at $869 per ton, with harvest costs adjusted to reflect a reduced yield from 4.4 to 3.85 tons (the same procedure that was followed by BE in its exhibit SP-121), the profitability of grapes at $869 per ton is clear. All borrowings and interest are repaid at the end of 16 years, and there is an accumulated net profit at the end of 25 years of $6,616. The calculations are shown in full at page iii of our Appendix A.

In sum, grapes are "extremely profitable" by everyone's numbers and would be on the northern lands.

2. In contrast to prices, the state parties argue at length about the difference in the Boyle projected yield of 5.5 tons per acre of table grapes and the BE projection of 4.4 tons. As we believe is obvious, we have a twofold position on the matter of yields. In the first place, we believe that the Boyle projection is reasonable. Secondly, however, we think that it is unnecessary to decide the point because even at a yield substantially lower than the 4.4 tons projected by BE, grapes are profitable. On this point the state parties assert that "there has been some indication that you can make a profit on grapes at only a 350 lug yield." (SP I, 201; the state parties cite the transcript at 5666-5667, which is more likely FY-43). There is much more than just "some" evidence. Exhibit FY-43 is Lowell True's statement to the BE investigators that 350 lugs (3.85 tons) has been enough to be profitable throughout the state. There is *no* evidence to the contrary. Bozick admitted at pages 5567-5568 that he covers *all* expenses on his 350-lug yield on class VI land (and as we have just seen, he does a lot better than that.)

Lowell True also believes that state parties' assertion that BE's agricultural contracts were either negative or neutral as to permanent crops along the Colorado River. True was one of the principal agricultural experts BE consulted, and it was True's opinion, of which BE was aware, that

> "based on the limited climatic data available, the winter chilling hours and accumulated heat units should be adequate to produce the same variety of table grapes, deciduous fruit and pecans that are currently being grown in this area [Phoenix]. All of these crops respond well to deep, well-drained soils and good quality ir-

rigation water, the Colorado River source being a big advantage in this respect." (TR XXI, 4185).

3. The state parties contend that it would not be economically feasible to grow grapes because marketing 9,700 additional acres of grapes would affect the market price. This argument is the last refuge of a competitor. Obviously, the laws of supply and demand affect markets. There have been recurring times in Southern California, for example, when too many oranges have been planted. But this has nothing to do with deciding whether soils are practicably irrigable. Markets will fluctuate. Prices will rise and fall. Growers will go into and out of production of particular crops. But if the effect of production on prices were to be a determining factor in whether to go into production, it is almost a certainty that the majority of all decisions by all growers to produce particular crops would be deemed economically infeasible because of the effect on the market. Indeed, to us the very fact that this contention is made is the best possible argument against using economic feasibility as the criterion for determining practicable irrigability. But whether or not the Court accepts the position of the Quechans on that point, the question of the effect of production on markets is not a proper criterion for determining practicable irrigability.

Even if the effect on markets were a proper consideration, the short answer to the overproduction argument is that no one suggests bringing in 9,700 acres of table grapes in one year. The technical problems involved in planting that many grapes would alone preclude such action. Chavez testified that because the demand for table grapes is strong and increasing (TR XXIII, 4700-4701, 4758-4759) Superior Farms is planting 300 new acres per year, and in addition is removing approximately 1,000 acres of citrus in the Bakersfield area and replacing it with white wine grapes. (TR

XXIII, 4759). If the Indians were to follow a similar program — say, 500 new acres per year over 10 years — the depressant effect forecast by the state parties would be avoided, and some such program of gradual development is what would have to occur considering the magnitude of the task.

4. The state parties contend that there is no commercial history of table grapes in the lower Colorado River valley. They mention the 160 acres of grapes on the Yuma mesa that were supposedly taken out because they couldn't meet minimal packing and marketing demands. The State parties omit Dr. Kleinman's comment on that same 160 acres of grapes that the farmer (Bud Linfesty) said that his grapes did rather well. (TR V, 820). They omit the findings of BE investigators about those 160 acres that "they performed very well *and matured early*." (Ex. FY-47; emphasis added). They omit the testimony of Richard Kaighn of Von Santau Ranch, for whom Linfesty now works, that "Mr. Linfesty is an old-time grape farmer, and he planted, that I know of, 160 acres of grapes on the Yuma mesa.

"Q. How did they do?

"A. They did very well; they did very well. Grapes are obviously a good crop for that area."
(TR IX, 1633).

They omit Lowell True's explanation for why Yuma area grapes went out of production in the early seventies, namely that "grape prices were low and citrus high therefore due to economic pressure." (Ex. FY-42). They omit the findings of the BE investigators that in 1969 there were 1,070 acres of table grapes being grown in Yuma County, *and in 1978, 1,110*. (Ex. CR-25). And, of course, they redefine the Colorado River Valley to exclude the White Wing Ranch, even though Kondora testified that it is all the same Southern California-Southern Arizona desert area and he was not

aware of any significant climatological differences between the White Wing area and the Yuma area, White Wing he thought, being just slightly warmer in the winter time than Yuma. (TR X, 1883-1884).

In short, the state parties omit all evidence showing that grapes are a good crop for the Yuma area, have done well there, and have matured early. As we have pointed out below, there are actually more heat units in the Yuma area than Coachella during the growing season, so that Yuma grapes, as Linfesty's acreage suggests, would probably mature earlier than Coachella.

5. The parties contend that the lack of permanent crops in the Colorado River Valley proves that they are not suitable for production there. They quote Chavez' testimony that the lack of such crops in the area suggests environmental and climatic factors precluding production. (SP I, 104). This argument is specious but is defeated by past experience. If his point were to be taken seriously, one would have had to conclude in 1960 that the San Joaquin Valley was not suitable for growing pistachios because none were being grown there. All it took to prove the theory wrong was one farmer named Ruley who started to make a lot of money on three and one-half acres of pistachios. As a result, there are thousands of acres of pistachios in production in the San Joaquin Valley today.

The same experience defeats the argument as to grapes. The White Wing Ranch, as the state parties admit, is growing grapes profitably. (SP, Vol. I, p. 162). The first grapes were planted at White Wing in 1959, and according to the state parties there was no record of any successful commercial production of grapes anywhere in the area at that time. If that were the criterion, grapes would not have been planted at White Wing in 1959, because the lack of production would supposedly have demonstrated that grapes

were not suitable for the area. Yet White Wing has an over 20-year record of grape production at this point, and is making a handsome profit. The lack of large-scale grape production in the Yuma area means only that nobody has yet analyzed the success of Linfesty's 160 acres and the White Wing's 700 acres closely enough to make additional large-scale plantings.

6. The state parties contend that a vice in the tribes' economic feasibility studies is the assumption that there will be a high level of management; "that all the Indian farmers will be the best farmers . . . ." (SP I, 108). The short answer is that the Indians themselves need not be the best farmers, they need only be able to hire the best management, which would be economically feasible for the scale of operations projected here, and the State parties do not, and we presume would not, attempt to argue that the best management could not be retained.

7. The state parties contend that the great problem with grapes along the Colorado River is that the winters are cooler than Coachella, which would mean later harvest, loss of competitive advantage, and the dangers of summer rains and heat. (SP I, 163-170). Witnesses Beeby, Chavez, and Bozick all made this argument based on their knowledge that it gets hotter in the winter in Indio (Coachella Valley) than it does in Yuma. But the mistake all of them made was to assume that a higher maximum winter temperature equates with higher heat units during the winter growing season. It is clear that it is heat units, not maximum temperatures, that are important (TR XXIII, 4785-4788), and the number of heat units in Yuma during the critical winter growing season substantially exceed Indio's. Thus, the very argument on which the State parties rely to suggest a later harvest in Yuma actually proves that there would be an earlier harvest in Yuma than in the Coachella Valley, and

the supposed problems with summer heat and rains disappear. As Kondora of White Wing, which is competitive with Coachella, stated, one of their advantages is that they don't get excessive heat or rain at harvest time. (TR X, 1867-1868). The State parties, recognizing this problem, claim repeatedly that White Wing is warmer than Yuma, but as we pointed out above, Kondora actually said that there was no *significant* climatological difference, there being only a slight temperature difference. (TR X, 1883, 1886). So there would be no significant difference in harvest time between the two areas.

And Kondora was comparing White Wing temperatures with the Yuma mesa. Lord testified that the northern lands would have a better temperature and heat unit advantage than the weather station at the Yuma airport (which is Yuma mesa); that because of their southeasterly exposure and good air drainage, the northern lands would do better than the Yuma mesa. (TR XXXI, 6406-6407).

8. On the same point, the obvious difficulty, reflected in the State parties' argument of overcoming the facts, which show that Yuma grapes would harvest earlier than Coachella, has forced the State parties into an argument manufactured from whole cloth. They contend that the formula chosen by Richard Smith of Boyle for computing heat units *may* be inaccurate in utilizing average monthly and average (mean) daily temperatures, both of which methods show more heat units for Yuma than for Coachella. The State parties argue that the right formula *may* be average (mean) maximum daily temperatures, which they say would favor Coachella. They admit they do not know this to be true, but they contend that there is insufficient evidence to determine *the* correct formula and, therefore, that the tribes have failed in their proof.

This argument requires an insouciant disregard of Chavez' testimony. Chavez said that what we are talking about is the number of days in which the temperature goes above a certain minimum and the number of hours during that period of time that the temperatures would exceed that minimum. (TR XXIII, 4787). Now, that computation is exactly the one made by Richard Smith. As shown on exhibit CR-35, he calculated the number of degree days (heat units) as equalling the average monthly temperature minus 50° F. and multiplied that by the number of days in the month. That computation produces the number of heat units which Chavez testified ws the correct formula.

The State parties now suggest that average (mean) maximum daily temperatures might be the correct formula without offering a shred of evidence that in fact it is a meaningful formula. Smith, by contrast, testified that the approach shown on exhibit CR-35 is the formula for determining heat units between bloom and harvest *and is a widely accepted approach in the profession*. (TR XXX, 6195). That testimony is credible; the unfounded suggestion by the state parties of a possibly different formula, with no support in the record, is not credible. The plain fact is that Yuma will have more heat units for grapes in the winter growing season than Coachella, will harvest earlier, and will have a competitive advantage.

Smith's testimony was corroborated by the soils expert for the Quechan Tribe, Mr. Joe Lord. The State parties would dismiss Lord's testimony in Atlanta because Lord testified that he did no comparative climatological studies for his original report, which is true but not pertinent. Between the time Lord testified in Denver and the time he took the stand in Atlanta, Chavez and other witnesses had testified for the State parties as to the supposed climatological advantage of Coachella over Yuma. For that reason,

counsel for the Quechan Tribe specifically asked Lord to do a climatological study of weather records at Yuma and Coachella, and Lord testified that he used the air base at Yuma and at Indio as a basis for a comparative climatological study. (TR XXXI, 6405). He calculated the growing degree days for four years back, from 1977 to 1980 inclusive. He determined that Yuma had a higher accumulative growing degree day than Indio. He examined exhibit CR-35 and determined that the study he made was of the same kind as Smith's study. He had examined exhibit CR-35 before testifying in Atlanta, and the conclusions there were consistent with the ones he independently reached. Like Smith (and like Chavez), he testified that it was the *average* daily temperature which was to be utilized for the purpose of calculating growing degree days, and he testified that in his opinion grapes on the northern lands would come in earlier and be taken off the ground earlier than Coachella. (TR XXXI, 6404-6405).

In connection with Lord's testimony, the State parties argue that the northern lands are higher than Coachella, from which it apparently is supposed to follow that temperatures would be lower. The contrary is true. As Virgil Jones testified, it generally is true in the Colorado River Valley areas that the temperature is higher as one gets higher up on the mesa. (TR XXIV, 5009-5010). On most mesas, he said, there is a drainage of air that keeps the low temperature from dropping to a very low, and conversely it gets hotter up there in the hot season during the middle of the day than it does in the valley. That is pretty much true throughout the year, he said, that the higher mesa areas are not going to get as cold at night and will get hotter during the daytime. (TR XXIV, 5035-5036).

9. The foregoing comments about heat units, demonstrating that the Yuma area would have at least as early and

probably an earlier harvest time than Coachella, disposes of the entire argument of the state parties that summer rains would be a problem in the Colorado River area. The whole argument is based on the premise that harvest time will be later in the Colorado River area than Coachella. On the basis of the evidence demonstrating the earlier harvest time in the Yuma area, the summer rain threat disappears. So does the summer heat threat, which, once again, would present no greater problem in Yuma than in Coachella, with the latter's higher maximum daily temperatures.

10. State party witness John Bailey is cited for the proposition that lands with high concentrations of boron would be totally unsuitable for fruit, and it is extremely improbable that the boron could be leached. (SP I, 86-87). Bailey so testified in Denver; the State parties later acknowledge Bailey's retreat from that position to his later conclusion that 5,820 acres were arable, subject to leaching tests in the field to prove that boron could be removed. If Bailey had continued to believe that it was extremely improbable that the boron could be removed, he would not have later labeled those lands arable.

11. The State parties say that Bailey found 5,540 acres of the northern lands to be "potentially arable", but in fact Bailey did not say anything about their arability being "potential." He reported on exhibit SP-139 that those 5,540 acres (and 280 more) were "arable, suitable only for trees and vines." Exhibit FY-49, the BE analysis, finds those same lands to be "gravelly and/or cobbly, suitable for trees and vines only." And in the Bailey testimony which the state parties cite (TR XXV, 5077), Bailey says, "the most extensive areas shown in green are considered suitable for trees and vines." As we have said, there is agreement between the Lord people and the BE people that 5,820 acres

of the northern lands are suitable for irrigated agriculture for permanent crops.

12. The State parties cite the testimony of Virgil Jones about the deep washes and rocky soil of the northern lands. They omit that portion of Jones' testimony in which he acknowledged that there were large areas of the northern lands which were flat desert pavement "very large areas" as he said. (TR XXIV, 5033). The deep washes Jones was describing were not areas found by the Quechan experts to be practicably irrigable. (TR XXIV, 4912). Jones testified that leveling and smoothing costs would preclude economic farming of the lands he was discussing (TR XXIV, 4910, 4913), whereas one of Lord's cardinal points in his testimony was that the lands he proposed to irrigate should not be leveled or tilled at all, further evidence that Jones was not describing the lands Lord found irrigable. The same comment applies to the testimony of Bozick, who apparently looked at that portion of the northern lands which involved deep gorges and ditches and in his opinion would require leveling but then went on to acknowledge that there were apparently large flat desert pavement areas in the northern lands and that the gully and wash problem did not exist on those lands. It seems apparent that Bozick did not even see those large flat areas. When he was asked about them, he did not testify that he had seen them but said "I understand that" those areas exist. (TR XXVII, 5564-5565).

13. The State parties attack Lord's findings of irrigable acreage by pointing out that Dr. Stoneman found only 3,200 acres to be irrigable, which they describe as "even less" than the arable acreage Bailey found. (SP I, 94). This is hardly an attack on Lord; rather, it shows the inadequacy of the whole United States investigation of the northern lands.

14. The State parties attack the Quechan's expert witness, Joseph Lord, not on what he said or did but on a supposed lack of qualifications. Thus, for example, the State parties contend that soil analysis, suitability for crops, and classification of crops are "fields of inquiry which are outside the limits of his expertise." It is a compliment to the solidity of Lord's testimony that the State parties have elected not to attack it directly but to attack the witness himself. The record of Lord's qualifications, however, destroys that attack. We are talking about a man who has spent 17 years in soils work. His qualifications include the following:

(a) He spent four years in southeast Asia with the Bureau of Reclamation doing irrigation and drainage studies. They were investigating a large land area for potential irrigation out of the Mekong and other rivers. (TR X, 1957-1958).

(b) He spent three years with the Bureau of Reclamation, from 1971 until 1974, in charge of the Irrigation Management Services program, a demonstration research project for improving irrigation efficiencies on federal lands. The program included educating landowners in plant water use and irrigation efficiency. (TR X, 1958-1959).

(c) He spent five years with Harza Agricultural Services, rising to the position of president of the company. The work involved contracting with private landowners, farmers in production, to assist in their water management. (TR X, 1959).

(d) The services of Harza included also soil mapping and soil classifications on two large ranching operations (one of 20,000 acres) involving complete typographical mapping with aerial photography and stereo plotting. (TR X, 1961-1962). The purpose was to assist the landowner

to develop his soil, land, and water. (TR X, 1961). In addition, Harza operated a complete agricultural laboratory for analyzing soil, water, and plant tissue; complete, meaning that it performs all of the agricultural analyses necessary for management of soils or crop fertility, including salinity, pH, AWC, and similar tests. (TR X, 1960-1963).

(e) Lord personally wrote a computer program for Harza, based on his Bureau of Reclamation work, which assists landowners in evaluating soil, water, plants, and atmosphere, and helps in predicting changes in irrigation, all for the purpose of assisting the landowner in the irrigation of his lands. (TR X, 1964-1965).

(f) Lord acquired the business of Harza in 1978 and since then has headed his own business furnishing agricultural services to agribusinesses. In the Yuma area they provide a complete range of services to a 15,000-acre farm, operated by Red Mountain Farming Co., which also plans to bring in another 15,000 acres in the next two years. Lord's company provides laboratory, engineering, agronomics, and cropping plans for Red Mountain. (TR X, 1965).

(g) Red Mountain Farming Co. is only one of Lord's clients. His daily business at the present time involves management and irrigation services to clients farming 60,000 acres of land. (TR X, 1965; TR XXXI, 6398).

(h) The personnel of the Lord Company, who participated in the soil suitability classification study of the northern lands included, besides Lord, two degreed agronomists, a soils or field technician, and an agricultural scientist with a degree in biology, who has worked in agriculture for a number of years. And in addition, he utilized as an outside consultant Dr. Donald Post, who is affiliated with the University of Arizona, has a wide background in inventory

and evaluation of soil characteristics and mapping of soils, and has an intimate knowledge of the complex of soils that the Lord group were dealing with in the Yuma area. Post worked in the field with the Lord group. (TR X, 1967-1969).

15. The State parties' attack Keith Satermo's testimony, the engineering expert produced by the Quechans. They argue that his water delivery system is inadequate on the ground that it is not rebuttal testimony. (SP II, 45).

Apparently the state parties' impression is that Satermo's own calculations of the cost of a water delivery system, as reflected in exhibits FY-18 and FY-57, were not offered as evidence but were used merely as a foundation for further calculations suggested by Quechan counsel. Nothing could be further from the truth. Satermo's opinions as to the cost of a water delivery system are reflected in FY-18 and FY-57, both of which are in evidence. Thus, it is incorrect to attempt to limit Satermo's rebuttal testimony in Atlanta to exhibit FY-58, as the state parties do. (SP II, 46). As one example, Satermo's calculations as to costs are shown on FY-57. The fact is, however, that Satermo used a May 1980 date for calculating costs. Everyone else had used July 1979. FY-58 reflects costs as of July 1979. Had it been critical to the Quechan case, we would have emphasized much earlier our right to make the adjustments to Satermo's opinions which are shown in the changes from FY-57 to FY-58. As it happens, our economic analysis [illegible]s that the permanent crops we discuss are feasible even at Satermo's higher cost figures, so the reductions shown in FY-58 (and the reductions from FY-18 to which Satermo testified in Denver) would become important only if the Special Master had concluded that the payment capacity for water costs were too high.

16. The State parties contend that the Quechan Tribe has presented no economic analysis to support any claim of practicable irrigability for citrus, dates, and asparagus. The evidence in the record on those crops shows them all to be economically feasible. The State parties contend that "dates made their first real appearance in this matter during the Fort Yuma rebuttal case." (SP I, 180). On the contrary, the Quechans began their presentation of evidence on dates with extensive cross-examination of Dr. Kleinman in Denver on the subject and continued in Denver by obtaining evidence from Kondora as to the profitability of dates. Further evidence was obtained on cross-examination of Dr. Chavez, which demonstrated the high profitability of dates, and from subsequent testimony in Atlanta by witness Bell. The State parties claim that "there was, of course, no economic analysis" (SP I, 181) meaning apparently that the Quechans did not put a Dr. Kleinman on the stand. There is no magic formula for economic testimony. Any evidence in the record demonstrating the economic feasibility of dates is admissible and entitled to be weighed by the court. The Quechans are satisfied that the very strong evidence on the profitability of dates, coming from witnesses for the United States, for the state parties, and for the Quechans themselves is sufficient to make the economic analysis for that crop.

The Quechans also put on evidence on citrus from a successful grower, which we submit is superior testimony to that of economists presenting secondhand opinions. The State parties would throw out that evidence on the ground that the Quechans should be bound by the testimony of their own expert, Lloyd Zola, that he discarded citrus. Zola, of course, did no independent studies. He simply analyzed what Kleinman, Boyle, and BE had done.

We have made our case on the direct evidence in the record; in the case of citrus, the experience of the Von

Santau Ranch and our critical analysis of the Kleinman and BE citrus studies.

17. The State parties contend that there should be a reduction from gross to net acreage of 6 percent. The Quechans contend that that reduction does not apply to the northern lands because, as indicated in the Lord report, a 10 percent reduction has already been made by Lord to provide for drainage, and the necessary canals, roads, and structures could be provided within that reduction.

III.

THE BOUNDARIES OF THE RESPECTIVE INDIAN RESERVATIONS HAVE BEEN "FINALLY DETERMINED".

On August 28, 1979, Special Master Tuttle in his Memorandum and Report on Preliminary issues said:

> "I conclude that the determinations that have been made with respect to the stated boundary changes may be accepted as final for the purpose of considering additional allocations of water rights to the reservations."

In response, the State parties have taken exception to this conclusion by asserting that the Orders of the Secretary of the Interior and the judgments of the Federal Court cases he relied upon were not final determinations of reservation boundaries for the purpose of establishing water rights. Then they have added that the United States and the Tribes must first establish through adjudication with the contesting parties in other litigation the correctness of any disputed boundaries. The Tribes submit that the law is contrary to the State parties' position, and that Special Master Tuttle is correct.

It is important to note that the State parties admit that adjustments for boundary determinations were explicitly provided for in the 1979 Decree and impliedly contemplated

in the 1964 Decree. "In the event that the boundaries of the respective Reservations are finally determined." Thus, their argument against the Master's recommendations turns on the question of whether or not the boundaries have been "finally determined". In other words, the issue raised by their exception is whether Secretarial Orders, Court judgments, and Acts of Congress relied upon by the Tribes of the United States are final determinations within the contemplation of this Court's Decrees.

The Tribes submit that it is strange that the State parties have raised this issue for the first time. During the first hearing in this case no State party contested the right of the Court to accept as final and binding for the purpose of this litigation the then-recognized boundaries of the Indian Reservations involved. The boundaries at that time were the result of Secretarial Orders, Court judgments, and Acts of Congress. Nevertheless, they were all deemed to be final for the purpose of water allotments then presented to the Court. This undoubtedly happened due to the fact that it was totally consistent with the existing law and authority. For instance, one need only look to 25 U.S.C. 176 to discover the authority which established the Secretary's right to define the boundaries of Indian Reservations. Therein the Congress expressly declared that surveys of Indian Reservations shall be under the "jurisdiction and control of the Bureau of Land Management and as nearly as may be in conformity to the Rules and Regulations under which other public lands are surveyed." 43 U.S.C. 751, 752 establish the general rule for the conduct of such surveys. 43 U.S.C. 772 authorized the resurvey of boundaries:

> "The Secretary of the Interior may, as of March 3, 1909, in his discretion cause to be made as he may deem wise under the Rectangular System in that date provided by law such resurveys or retracements of the

> public lands as, after full investigation, he may deem essential to properly mark the boundaries of public lands remaining undisposed of: provided that no such resurvey or retracement shall be so executed as to 'm-pair bona fide rights or claims of any claimant, entry-man, or owner of lands affected by such resurvey or retracement."

Our Courts have viewed this statute as a broad grant of authority stating that, "prior to title passing from the United States, it is undisputed that the government has the power to survey and resurvey, establish and reestablish the boundaries on its own land." *U.S. v. Reimann*, 504 F.2d 135, 138 (10th Circ. 1974); See also *United States v. State Investment Company*, 264 U.S. 206 (1924). In other words, no one can seriously doubt the authority of the Department of Interior with respect to public lands. *United States v. Schurz*, 102 U.S. 378, 395 (1880); *Cragin v. Powell*, 128 U.S. 691, 697-699 (1888); *Knight v. United States Land Association*, 142 U.S. 161, 177-178 (1891); *Johanson v. Washington*, 190 U.S. 179, 185 (1903); *Lane v. Darlington*, 249 U.S. 331, 333 (1919).

A. The Allegation of Unilateral Action.

Notwithstanding the well established law pertaining to the legal rights of the Secretary of Interior to issue Orders pertaining to the boundaries of Indian Reservations, the State parties have claimed that the Secretarial Order of December 20, 1978 was unilateral and therefore improper. In fact, on Page 62 of the exceptions by the State parties, they have stated:

> "The unilateral action taken by the Secretary of Interior is almost shocking in the case of December 20, 1978 Secretarial Order relating to the Fort Yuma Reservation".

The Tribes are not shocked by the December 20, 1978 Secretarial Order, nor can they understand why the State parties should be shocked. The Order in question merely reaffirmed the boundaries of the Fort Yuma Reservation that was created by Executive Order in 1884. I *Kappler* Indian Affairs, Laws and Treaties, Page 832. Following said Executive Order of 1884, there never has been any objection to the boundary designated therein by the State parties. This undoubtedly is due in part to the fact that the State parties have never had any standing to object. In fact, the 1884 boundary really never changed. There was some confusion, however, due to an 1893 Agreement providing for cession of a considerable amount of the Reservation by the Quechan Indians. This Agreement was ratified by Congress in 1894, but as a practical matter the Agreement was not given much consideration because conditions subsequent contained therein were never fulfilled. However, a question arose after Congressional authorization for construction of the All American Canal as to whether or not the consent of the Indians should have been secured before proceeding with the construction of the Canal. Thus, in the face of an embarrassing situation Solicitor Margold for the Department of Interior wrote an Opinion that espoused the conclusion that the consent of the Indians was unnecessary since they had lost any claim to the lands traversed by the All American Canal by virtue of their 1894 Agreement.

Margold's Opinion was immediately brought under attack by the Quechan Indians, who at the time were not able to exercise a great deal of political clout. As a consequence, they proceeded to file a claim against the United States with the Indian Claims Commission for compensation by reason of this unconscionable taking of their land. By 1870, they still had not received satisfaction; so they instructed their attorney to proceed on their behalf to secure an administra-

tive resolution of their problem by obtaining a reaffirmation Order from the Secretary of the Interior. In 1975 they optimistically concluded that they had succeeded when Secretary of the Interior, Thomas Kleppe, explained in detail his desire to reaffirm the title to their 1884 Reservation. Again political clout became a factor when the State parties strongly protested any such reaffirmation Order. This was disappointing to the Indians but they persisted. Hence, with a combination of dedication and tenacity, the Indians filed a Petition for hearing in this Honorable Court in December of 1977. In early 1978 they were granted the right to file a Petition for intervention by the Court, and this led to oral argument on October 20, 1978. On that date, a representative for the Solicitor General, Mr. Louis Claiborne, orally informed the Court that after years of discussion and negotiation involving all parties, that the office of the Secretary of Interior had decided to issue a reaffirmation Order of the 1884 Fort Yuma Reservation subject to certain intervening third party rights and a new survey. Certainly the State parties cannot now be heard to complain about reaffirmation of an Order made nearly one hundred years ago by the President of the United States. Furthermore, it is inconceivable that the State parties could describe the action of the Secretary as "unilateral" in view of the repeated courtesies he extended them throughout the entire time while the Tribe was endeavoring to recover what they sincerely believed was rightfully their's. On this point it is perhaps also significant to note that the Reservation area in question was part of the aboriginal homeland of the Quechan Indians, a matter which was adjudicated by the Indian Claims Commission with a decision to the effect that the Quechans had exclusively used and occupied this area "from time immemorial".

B. State Parties Not Privy to Action.

The State parties in taking exception to Special Master Tuttle's conclusion regarding the finality of the boundaries on the respective Indian Reservations have also argued that they were not privy to what was done, and that their rightful interests should not have been ignored. Again, it is difficult to follow their argument if one merely reflects upon the facts surrounding the Fort Mojave Hay and Wood addition to the Reservation. The Fort Mojave Military Hay and Wood Reserve was created by an Executive Order on March 30, 1870. General Order No. 19 of the War Department, dated August 4, 1870, defined its boundaries. An Executive Order dated September 19, 1880, transferred the Fort Mojave Military Reservation and the Hay and Wood Reserve to the Department of Interior for use by the Fort Mojave Indians. On March 5, 1910, the State of California filed an application under the Swamp Land Act of 1850 with the Commissioner of the General Land Office of the United States for this same area known as the Mojave Hay and Wood Reserve. At that time, the records of both the archives of the United States and the Bureau of Land Management showed that the record owner thereof was the Fort Mojave Indian Tribe pursuant to that certain Executive Order of March 30, 1870. On July 9, 1912, California's claim was rejected "subject to the usual right of appeal". Ordinarily, this would have been considered a closed chapter after the period for appeal had expired, but with the passage of nearly half a century, on April 24, 1959, California decided to resurrect its claim to this land and filed a new application for the same land they had sought in 1913. Hence a new hearing was scheduled for April 22, 1965, where California's claim was for a second time rejected. This time, however, California pursued the matter with greater diligence and appealed to the Director of Land Management. Thus,

on January 24, 1966, a document entitled "Decision . . . Hearing Ordered" was issued which stated:

> "A hearing is hereby directed to be scheduled by the Chief Hearing Examiner, Sacramento, California."

Daniel Webster once said: "The truth will out", and quite fortuitously the whole truth of these proceedings initiated by California and the hearings leading to the decision to grant California a hearing came out for the first time as "startling news" to the Fort Mojave Indian Tribe during the last days of June, 1967. Neither the Tribe nor the Indian Bureau had ever received any notice of these hearings. Hence, on July 11, 1967, Commissioner Bennett of the Bureau of Indian Affairs officially requested permission for the Tribe to intervene. Intervention was then allowed and hearings were thereafter held in California, which, after appeal, led to an ultimate decision in favor of ownership of the Hay and Wood Reservate by the Fort Mojave Tribe.

In light of the above facts, how can the State of California sincerely contend that it was not privy to the facts regarding the boundary situation pertaining to the Fort Mojave Hay and Wood Reserve? After all, California was the main adversary of the Fort Mojave Tribe in this proceeding. Furthermore, their current complaint is not entitled to much consideration since they didn't even see fit to take an appeal from the determination by the Secretary of Interior's Order of June 3, 1974, acknowledging ownership of the Hay and Wood Reserve by the Fort Mojave Tribe. In the Matter of Land Classification, State of California, Applicant, Fort Mojave Indian Tribe, Intervenor. LA 0164001 Swampland Selection A-31022 before U.S. Department of Interior, Bureau of Land Management.

C. Need for Court Adjudication.

In their attack upon Secretarial Orders establishing Indian reservations the State parties have further argued that such a matter must first be determined by a court of competent jurisdiction in order to be final. However, despite the fact that there are other ways of determining the boundaries, it is submitted that the State parties are not even satisfied when the boundary question is decided by a court of competent jurisdiction because the record shows that they are still unwilling to accept the Decree. This is graphically illustrated by the case of *Mojave v. LaFollette, Fort Mojave Tribe v. LaFollette* (D. Ariz. Civ. 69-324 MR). In the *LaFollette* case an action was brought by the Fort Mojave Tribe to quiet title to certain lands they alleged were part of the Mojave reservation. There were many defendants who in turn orchestrated their defense against the Mojave allegations with a concerted motion to dismiss. Their motion to dismiss was predicated upon the claim that the Tribe did not have standing to sue. The Court granted their motion and the case was appealed to the Ninth Circuit, where it was then reversed. The reversal was predicated upon the conclusion that the Fort Mojave Tribe had recognized title, and particular reliance was placed upon the language in the 1964 Decree in *Arizona v. California*, 373 U.S. 546, 10 Lawyers Ed. 2d 542. The State of Arizona argued that the Mojave Indians were not entitled to claim any water since they really had no proprietary interest in the Executive Order Reservation upon which they resided. In response this Court said:

> "Some of the reservations of Indian lands here involved were made almost a hundred years ago, and all of them were made over 45 years ago . . . Congress and the Executive have ever since recognized these as Indian reservations. Numerous appropriations, includ-

> ing appropriations for irrigation projects, have been made by Congress. They have been uniformly and universally treated as reservations by map makers, surveyors, and the public. We can give but short shrift at this date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive."

Why should the State parties who participated in the early hearing in this case give less recognition re the Fort Mojave Reservation boundary than has been given by the United States Supreme Court? Of course, the State parties will say that they were not parties to the LaFollette lawsuit, and this sounds pretty good until one realizes that there would be no possibility for them to be parties since they have absolutely no proprietary interest in the land in question. In other words, the State parties would not have standing to sue. From this it must therefore be obvious that insisting that boundary disputes should be determined by actual adjudication in the Courts is an impractical suggestion. The laws of Congress already provide the ways and means for determining the boundaries of Indian reservations. The Tribes believe this historical precedent has been sufficient and is still sufficient. As Special Master Tuttle stated:

> "The United States, in the exercise of its plenary power to regulate Indian affairs, may establish Indian reservations by Executive Order. *Arizona v. California*, 373 US 546; 598 (1963). In the administration of public lands, the United States may survey, resurvey and adjust its surveys. *Borax Consolidated Ltd. v. Los Angeles*, 296 U.S. 10, 16-17 (1935); *Cragin v. Powell*, 128 U.S. 691, 698-700 (1888). Where such adjustment and resurveys affect private rights, they may be challenged and corrected by Court action to quiet title. *United States v. State Investment Company*, 264 U.S.

206, 212 (1924). These are precisely the sorts of determinations and proceedings which have occurred in this case."

Conclusion.

The Quechan Indian Tribe argues that this Court should sustain the Special Master who has accomplished justice as a matter of equity in the face of a conflict of interest, and who has further objectively quantified under the established guidelines of due process the legal entitlement of the Quechans to their share of water from the Colorado River, the lifestream for the lands they have occupied since time immemorial.

Dated: June 23, 1982.

Respectfully submitted,

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